Supreme Court, U.S.
FILED
2009
OFFICE OF THE CLERK

No. 09-_____

In The
Supreme Court of the United States

KEVIN V. BURTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the common law writ of audita querela should be accepted as a permissible collateral attack, independent from a habeas corpus.

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OPINION BELOW

The United States Court of Appeals for the Fourth Circuit did not publish its decision not to issue a certificate of appealability, which was entered on July 29, 2009. App. 1 Per Curiam Opinion; App. 4 Judgment; App. 5 Mandate. The U.S. District Court for the Eastern District of Virginia, Richmond Division did not publish its decisions entered November 4, 2008, nor did it publish its Order denying the certificate of appealability entered February 5, 2009. App. 6 Memorandum Opinion denying relief; App. 9 Order; App. 11 Memorandum Opinion denying certificate of appealability; App. 13 Order denying certificate of appealability.

JURISDICTION

The Fourth Circuit Court of Appeals filed its decision July 29, 2009, denying Petitioner's request for a certificate of appealability. On October 28, 2009 this Court granted a 14 day extension of time for Petitioner to file a Petition for Writ of Certiorari, with a due date of November 10, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge or a court which has jurisdiction.

STATEMENT OF FACTS

On April 24, 2003, Petitioner Kevin Burton pled guilty to conspiracy to distribute cocaine. On July 25, 2003 the U.S. District Court for the Eastern District of Virginia, Richmond Division, sentenced Burton to 145 months of imprisonment and five (5) years supervised release. On June 7, 2005 the Court denied Burton's 28 U.S.C. §2255 motion, which raised counsel issues. On September 4, 2008, the Court received Burton's motion for writ of error audita querela pursuant to 28 U.S.C. §1651, which complained that the indictment was invalid because it was presented by an Assistant United States Attorney who was not properly sworn in to office. The district court found that both motions attack Burton's conviction on the ground that the Court lacked jurisdiction to enter a judgment against him. Further, the district court found that Burton used the all writs act, 28 U.S.C.

§1651 to circumvent the prohibition against successive 28 U.S.C. §2255 petitions.

Burton sought a certificate of appealability from the district court, and from the Fourth Circuit Court of Appeals, citing a seeming split in the circuits, albeit an uneven split, with the majority of circuits refusing to permit the writ of error audita querela as a separate vehicle for judicial review of a judgment in a criminal case.

REASONS FOR GRANTING THE WRIT

Audita Querela Should Be Accepted As A Permissible Collateral Attack, Independent From A Habeas Corpus.

In directing the clerk to file Burton's writ of audita querela as a 2255 petition, the district court relied on *United States v. Winestock*, 340 F. 3d 200 (4th Cir. 2003). *Winestock* involved an appeal from an order denying Winestock's motion for reconsideration of the district court's denial of Winestock's petition for writ of habeas corpus, 28 U.S.C. §2255. The review by the court in *Winestock* centered on a discussion of second collateral applications. The motion for reconsideration was considered to be a second application for collateral relief, since it was based on the same argument contesting the fairness of the criminal proceedings, with the added fact that the appellate attorney (whom Winestock claimed in his 2255 petition was ineffective) had been disbarred. Courts are required, in the Fourth Circuit and several

others, to treat Rule 60(b) motions as successive applications if the claims are repetitive. This is appropriate under the law of the Fourth Circuit, under *Winestock*. See also, *United States v. Richter*, 510 F. 3d 103 (2d Cir. 2007).

Burton's claim differs from *Winestock*, because the claim in Burton's audita querela writ is not repetitive; it is a contention he did not previously raise, and it squarely impacts the issue of whether or not the prosecution/judgment itself was lawful. Burton claimed that the district court was without jurisdiction to hear the case because the indictment was barred under the U.S. Constitution, Article VI, Clause III, since the indictment was presented to the grand jury by an improperly appointed Assistant United States Attorney. His habeas corpus petition raised counsel issues.

The district court also relied on an opinion from the Seventh Circuit, *Melton v. United States*, 359 F. 3d 855 (7th Cir. 2004) in which Judge Easterbrook wrote a scathing opinion on audita querela, restricting it literally to judgment debtors and declining to apply it to criminal cases. The opposite result occurred in *Kessack v. United States*, 2008 U.S. Dist. LEXIS 7739 (WD WA 2008). In *Kessack* the district court held that the United States Supreme Court clearly held that the enactment of 28 U.S.C. §2255 does not bar federal courts from considering common law writs, citing *United States v. Morgan*, 346 U.S. 502, 510 (1954) and *Doe v. INS*, 120 F. 3d 200 (9th Cir. 1997).

Burton contended that he met the standard of review to receive a certificate of appealability: A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003). The Fourth Circuit Court of Appeals found that Burton did not meet the requisite showing and denied his application for a certificate of appealability. App. 11.

Audita Querela Is The Appropriate Vehicle To Remedy Injustice In The Underlying Judgment/Sentence.

The writ of audita querela is a form of petition rooted in common law, specifically available to judgment debtors whose judgment was correct when issued, but later rendered incorrect. *Humphreys v. Leggett*, 50 U.S. 297 (1850). The writ of audita querela has since been replaced as a remedy almost entirely by the Federal Rules of Civil Procedure, but is still available to the extent that such a writ "fill[s] the 'gaps' in the current system of post conviction relief." *United States v. Valdez-Pacheco*, 237 F. 3d 1077 (9th Cir. 2001). In *Morgan*, *supra*, the Supreme Court affirmed the use of common law writs such as coram nobis in criminal cases. Subsequent to *Morgan*,

the Ninth Circuit recognized the significance of *Morgan* to writs of audita querela. (See *Doe*, *supra*) (difference between writs is one of timing not substance). As the *Doe* Court explained: "The teaching of *Morgan* is that 'federal courts may properly fill the interstices of the federal post-conviction remedial framework through remedies available at common law.'" *Doe*, 120 F. 3d at 203 n. 4 (citing *United States v. Ayala*, 894 F. 2d 425, 428 (D.C. Cir. 1990)). The *Doe* Court concluded that a writ of audita querela could only survive if a defendant has a legal defense or discharge of the underlying judgment. *Id.*, at 203-204, which Burton provided, and the claim should have been decided on its merits, not dismissed as a successive section 2255 petition. The writ of audita querela may not be solely on equitable grounds. *Id.*, at 205. It follows that the writ of audita querela should be available to remedy an injustice in criminal cases when no other remedy is available if Petitioner can demonstrate a legal defense to his sentence.

Burton Satisfied Standard of Review. It is submitted that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Based upon the circuit differences, Burton is entitled to litigate his claim to the highest court to have this circuit difference heard.

CONCLUSION

It is respectfully requested that the Court grant the petition for writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-6045

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN V. BURTON,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, District Judge. (3:03-cr-00006-HEH-1; 3:08-cv-00717-HEH).

Submitted: July 23, 2009
Decided: July 29, 2009.

Before WILKINSON and AGEE, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished PER CURIAM opinion.

Linda S. Sheffield, LINDA S. SHEFFIELD ATTORNEY AT LAW, Atlanta, Georgia, for Appellant. Richard Daniel Cooke, Assistant United States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin V. Burton seeks to appeal the district court's order construing his motion for writ of error audita querela, 28 U.S.C. § 1651 (2006), as a successive motion pursuant to 28 U.S.C.A. § 2255 (West Supp. 2009) and denying relief. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Burton has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument

because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

FILED: July 29, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-6045
(3:03-cr-00006-HEH-1)
(3:08-cv-00717-HEH)

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KEVIN V. BURTON,

Defendant-Appellant

JUDGMENT

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: September 21, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-6045
(3:03-cr-00006-HEH-1)
(3:08-cv-00717-HEH)

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KEVIN V. BURTON,

Defendant-Appellant

MANDATE

The judgment of this Court, entered July 29, 2009, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	Criminal No.
v.	)	3:03CR006-HEH
KEVIN V. BURTON	)	

MEMORANDUM OPINION
(Denying Motion for Writ of Error Audita Querela and Motion to Dismiss Indictment Nunc Pro Tunc)

(Filed Nov. 4, 2008)

On April 24, 2003, Defendant Kevin Burton pled guilty to conspiracy to distribute cocaine. On July 25, 2003, the Court sentenced Burton to 145 months of imprisonment, and five (5) years supervised release. On June 7, 2005, the Court denied Burton's first 28 U.S.C. § 2255 motion. On September 4, 2008, the Court received the pending motion for writ of error audita querela pursuant to 28 U.S.C. § 1651. On September 25, 2008, the Court received the pending motion to dismiss indictment nunc pro tunc. Both motions attack Burton's conviction on the ground that the Court lacked jurisdiction to enter a judgment against him.

A motion pursuant to 28 U.S.C. § 2255 "'provides the primary means of collateral attack on a federal sentence.'" *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (quoting *Cox v. Warden, Fed. Det. Ctr.*, 911 F.2d

1111, 1113 (5th Cir. 1990)), This Court lacks jurisdiction to entertain a second 28 U.S.C. § 2255 motion from Burton absent authorization from the United States Court of Appeals for the Fourth Circuit. 28 U.S.C. § 2244(b)(3)(A). Burton cannot avoid that result by styling a motion as a petition for a writ of error audita querela or as a motion to dismiss the indictment. *See Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004); *United States v. Winestock*, 340 F.3d 200, 207 (4th Cir. 2003) (emphasizing that inmates may not circumvent the limitations on successive § 2255 motions simply by inventive labeling). "Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit . . . or an application for a Get-Out-of-Jail-Card; the name makes no difference. It is substance that controls," *Melton*, 359 F.3d at 857 (citing *Thurman v. Gramley*, 97 F.3d 186-87 (7th Cir. 1996)). "Any motion filed in the district court that imposed the sentence, and substantively within the scope of § 2255[(a)], *is* a motion under § 2255, no matter what title the prisoner plasters on the cover." *Id.* (citing *Ramunno v. United States*, 264 F.3d 723 (7th Cir. 2001)).

Burton's current motions to vacate his conviction because the Court lacked jurisdiction fall squarely within the scope of § 2255. *See* 28 U.S.C. § 2255(a) (referring to claims that "the court was without jurisdiction to impose such sentence"); *Wright v. United States*, 202 F. Supp. 2d 471, 474-75 (W.D.N.C. 2002)

(treating 28 U.S.C. § 1651 motion attacking jurisdictional errors as successive § 2255 motion). The Clerk will be DIRECTED to file the present actions as unauthorized successive motions under 28 U.S.C. § 2255. The actions will be DISMISSED for want of jurisdiction.

An appropriate Order will accompany this Memorandum Opinion.

It is so ORDERED.

/s/ Henry E. Hudson
UNITED STATES
DISTRICT JUDGE

Date: Oct. 29, 2008
Richmond, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	Criminal No.
v.	)	3:03CR006-HEH
KEVIN V. BURTON	)	

ORDER
(Denying Motion for Writ of Error Audita Querela and Motion to Dismiss Indictment Nunc Pro Tunc)

(Filed Nov. 4, 2008)

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that the Clerk is DIRECTED to file Petitioner's motion for writ of error audita querela (Docket No. 84) as a § 2255 Motion; the Clerk is DIRECTED to file Petitioner's motion to dismiss indictment nunc pro tunc (Docket No. 85) as a § 2255 Motion; and, both motions under 28 U.S.C. § 2255 are DISMISSED for lack of jurisdiction.

Burton may appeal the decision of the Court. Should he wish to do so, written notice of appeal must be filed with the Clerk of Court within sixty (60) days of the date of entry hereof. Failure to file a written notice of appeal may result in the loss of the right to appeal.

The Clerk of the Court is DIRECTED to send a copy of the accompanying Memorandum Opinion and

this Order to Burton and counsel of record for the United States.

It is SO ORDERED.

/s/ Henry E. Hudson
UNITED STATES
DISTRICT JUDGE

Date: Oct. 29, 2008
Richmond, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	Criminal No.
v.	)	3:03CR006-HEH
KEVIN V. BURTON	)	

MEMORANDUM OPINION
(Denying Certificate of Appealability)

(Filed Feb. 5, 2009)

Kevin V. Burton, a federal inmate proceeding *pro se*, filed a motion for writ of error audita querela and a motion to dismiss his indictment nunc pro tunc. By Memorandum Opinion and Order entered November 4, 2008, the Court construed Burton's filings as successive § 2255 motions, and dismissed them for lack of jurisdiction. Burton has appealed that decision and requested that the Court issue a certificate of appealability ("COA").[1]

An appeal may not be taken from the final order in a § 2255 proceeding unless a judge issues a COA. 28 U.S.C. § 2253(c)(1)(B). A COA will not issue unless a prisoner shows "that reasonable jurists could debate whether (or, for that matter, agree that) the

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[1] On December 29, 2008, Burton electronically filed a motion for COA through counsel. On the same day, Burton filed a motion for COA by placing it in the mail. As the motions are identical, they are treated collectively.

petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). For the reasons stated more fully in the November 4, 2008 Memorandum Opinion, Burton has failed to direct the Court to any law or evidence that would suggest that he is entitled to further consideration in this matter. Burton's motions for a certificate of appealability will be DENIED.

And it is so Ordered.

/s/ Henry E. Hudson
United States District Judge

Richmond, Virginia
Date: Feb. 5, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	Criminal No.
v.	)	3:03CR006-HEH
KEVIN V. BURTON	)	

ORDER
(Denying Certificate of Appealability)

(Filed Feb. 5, 2009)

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that Burton's requests for a certificate of appealability (Docket Nos. 91, 95) are DENIED.

The Clerk is directed to send a copy of the Order and the accompanying Memorandum Opinion to Burton, counsel for the United States, and the Clerk for the United States Court of Appeals for the Fourth Circuit.

It is so ORDERED.

/s/ Henry E. Hudson
United States District Judge

Richmond, Virginia
Date: Feb. 5, 2009